



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 15, 1995

Ms. Bonnie Lee Goldstein
Vial, Hamilton, Koch & Knox, L.L.P.
1717 Main Street, Suite 4400
Dallas, Texas 75201-4605

OR95-382

Dear Ms. Goldstein:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32397.

The Town of Flower Mound (the "town") has received a request for "[a]ll criminal or code complaints filed against various individuals" by a particular resident. The town has submitted four categories of information for our review: exhibit 2 which consists of complaints that form the basis of litigation which has been concluded by prosecution; exhibit 3 which consists of complaints dismissed by the complainant after consultation with the prosecutor; exhibit 4 which consists of complaints pending investigation by the prosecutor in anticipation of litigation; and exhibit 5 which consists of representative samples of complaints forming the basis of code enforcement investigations.

The town asserts that all of these exhibits are excepted from required public disclosure by section 552.101 of the Government Code, in conjunction with the informer's privilege. The town also asserts that exhibit 4 is excepted from required public disclosure under section 552.103 and that exhibits 2, 3 and 4 are excepted from required public disclosure under section 552.108. Finally, the town asserts that exhibits 2 and 3 are records of the judiciary and are therefore not subject to the Open Records Act.

The Open Records Act applies to information maintained by or for a "governmental body." *See* Gov't Code § 552.021. The act expressly excludes the judiciary from the definition of the term "governmental body." *See id.* § 552.003(b).

The documents in exhibits 2 and 3 consist of applications for complaints and complaints filed in municipal court. They appear to be records of the municipal court. Therefore, these documents are not subject to the act. Access to them is governed by the common law right to inspect public records. *See* Attorney General Opinion DM-166 (1992); Open Records Decision No. 618 (1993).

You assert that documents in exhibit 4, complaints pending investigation by the prosecutor in anticipation of litigation, may be withheld from required public disclosure under section 552.108.¹ Section 552.108 provides that:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure].

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure].

Where an incident involving allegedly criminal conduct is under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. Open Records Decision Nos. 474 (1987), 372 (1983). Criminal complaints that are awaiting or are under investigation by a prosecutor may be withheld under section 552.108. Certain factual information generally found on the front page of police offense reports is public, however, even during an active investigation. *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976) at 3-4 (listing factual information available to public).

Finally, we consider whether offense report information in exhibit 4 and the documents in exhibit 5 and ones like them, complaints forming the basis of code enforcement investigations, are excepted under section 552.101 in conjunction with the informer's privilege.² The informer's privilege protects the identity of persons who report violations of the law to officials having the duty of enforcing particular laws. *See Roviato v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege does not apply to information that does not describe illegal conduct. Open Records Decision No. 515 (1988) at 5. The privilege excepts the informer's statement itself only to the extent necessary to protect the informer's identity. Open Records Decision No. 549 (1990) at 5.

¹One of the documents included in exhibit 4 does not appear to be a complaint made by the particular person specified by the requestor. Therefore, it is not responsive to the request and we do not address it.

²You have not raised any other exceptions to disclosure with respect to exhibit 5.

However, once the identity of the informer is known to the subject of the communication, the exception is no longer applicable. Open Records Decision No. 202 (1978) at 2.

With respect to exhibit 5, you have submitted to this office two complaints on a form entitled "TOWN OF FLOWER MOUND COMPLAINT FORM," which you assert are "representative samples" of complaints forming the basis of code enforcement investigations. It is not clear on the face of these documents that they report illegal conduct. Therefore, we have no basis to conclude that these particular complaints fall within the informer's privilege. Furthermore, it is impossible for this office to make a determination with respect to complaints that we have not reviewed. Therefore, we conclude that the town has not demonstrated that the complaints in exhibit 5, or ones like them, are excepted from disclosure under section 552.101. See Open Records Decision No. 549 (1990) at 6 (informer's privilege waivable by governmental body). Accordingly, they must be released. By contrast, it is apparent that the offense report information in exhibit 4 reports illegal conduct. Therefore, we conclude that any offense report information in exhibit 4 that may not be withheld under section 552.108 may be withheld under the informer's privilege.³

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Open Government Section

MRC/KHG/rho

Ref.: ID# 32397

Enclosures: Submitted documents

cc: Mr. Doug Fox
WFAA-TV
606 Young Street
Dallas, Texas 75202
(w/o enclosures)

³Of course, it may not be withheld if the identity of the informer is known to the subject of the communication. Open Records Decision No. 202 (1978) at 2.